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Written Testimony of

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before the

Senate Judiciary Committee
Subcommittee on Antitrust, Competition Policy and Consumer Rights

On

March 21, 2012

Regarding

"The Verizon/Cable Deals: Harmless Collaboration or a Threat to Competition and Consumers?"

INTRODUCTION

Chairman Kohl, Ranking Member Lee and esteemed members of the Committee, I thank you for the opportunity to testify before you today on behalf of Free Press. We are a nonpartisan nonprofit organization that works exclusively on technology and media policy. Through education, organizing and advocacy, we promote diverse and independent media ownership, strong public media, quality journalism and universal access to communications.

Mobile technology has transformed our society and our economy at a breakneck pace during the past decade. In 2011, there were close to 323 million wireless subscriber connections in the United States. Almost one-third of households in this country have severed their landline service and become fully dependent on wireless service to connect them to their friends, loved ones, and emergency services.[1]

Residential broadband service provides the foundation for the most vibrant sector of our economy. The Federal Communications Commission correctly writes in the National Broadband Plan that, "[Broadband] is enabling entire new industries and unlocking vast new possibilities for existing ones. It is changing how we educate children, deliver health care, manage energy, ensure public safety, engage government, and access, organize and disseminate knowledge."[2]

However, as the consumer base for these services grows, the market providing them is quickly consolidating. The mobile wireless market has become top-heavy, with just two carriers controlling a vast amount of the profits and market share.[3] Most consumers have the choice of only one, at most two, providers of residential wired

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[1] *See* CTIA, "Wireless Quick Facts: Year End Figures," *at* *http://www.ctia.org/media/industry_info/index.cfm/AID/10323*

[2] Federal Communications Commission, *Connecting America: The National Broadband Plan*,xi (2010) (*National Broadband Plan*).

[3] Verizon and AT&T together control nearly two-thirds of all wireless subscribers and nearly four-fifths of the entire wireless industry's profits. *SeeWireless Industry Benchmarks*, SNL Kagan (2012).

broadband service.[4] Prices have remained high through artificially constructed bundles that force consumers into buying larger packages of services than they want or need.[5]

This lessening of competition and the discipline it provided for the market has left consumers with fewer choices, higher prices and unfair terms and conditions. This is no accident. It is the result of public policy decisions over the last 12 years to deregulate the broadband marketplace while it still faced monopoly conditions, and to place a disproportionate amount of the nation's most valuable spectrum into the hands of just two wireless carriers.

Throughout much of my testimony I will focus on the specific consumer and competitive harms associated with the proposed transaction we are here to consider today. However, I would also like to provide a broader perspective to bring into focus the backdrop of consolidation against which this transaction is being proposed.

THE LOOMING CRISIS IN COMPETITION

In South Korea, connections are three times as fast as those in the United States and one-third less expensive per month. As a result, adoption rates are close to 94 percent.[6]

In France, you can get Internet service that offer speeds twice as fast as Comcast's DOCSIS 3.0, or Verizon's DSL. You can get that service, bundled with high definition TV *and* mobile data service, for your laptop throughout most of the country for $33 per month. Here in the United States, consumers pay three to five times that amount for the fastest speeds.[7]

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[4] *See National Broadband Plan* at 37.

[5] For example, a report from the industry-supported Technology Policy Institute found that broadband prices in the U.S. increased even as prices around the globe dropped. *See* Matt Lasar, "Broadband prices dropping around the world, but not US," *ArsTechnica*, Dec. 15, 2010. ISP earnings indicate broadband prices are on the rise. Over the past two years Comcast's average data revenue per user increased more than 5 percent, from $38.09 in 2009 to $40.11 in 2011. TimeWarner Cable's average data revenue per residential user also increased more than 5 percent during this period, from $36.39 in 2009 to $38.32 in 2011. Survey data indicates most U.S. broadband customers believe they are paying too much for their service, with one-quarter reporting they have only one provider offering service where they live. *See*"Broadband Expert Survey of US Consumers Finds 94% Believe They Are Overpaying for Their Broadband Service," Broadband Expert, Feb. 6, 2012.

[6] Sutter, John,"Why Internet Connections Are Faster in South Korea,"*CNN*, Mar 31, 2010.http://goo.gl/gRPS8

[7] Benkler, Yochai,"Ending the Internet's Trench Warfare,"*New York Times*, Mar 20, 2010. http://www.nytimes.com/2010/03/21/opinion/21Benkler.html?_r=1&adxnnl=1&adxnnlx=1311011445-7xRvradDUFNpBg1e/CJXmA

This is not a result of the free hand of the market. This is the result of a failure on the part of our nation's policymakers over the past 15 years to protect and promote competition.

In March 2010, the FCC published its National Broadband Plan, in which the Commission predicted that soon 75 percent of American households will have only one choice for at-home high-speed Internet service: their local cable monopoly.[8] These companies, which spent significant investments to upgrade their networks in the last decade, now stand poised to reap the windfall of an unregulated monopoly environment where they are currently raking in over 90 percent margins on providing data services.[9] But despite these incredibly high profits, prices for U.S. consumers continue to rise, even as they fall for consumers in other countries around the world.[10]

For example, over the past decade, the monthly price for basic cable has increased more than 50 percent, from under $33 in 2001 to nearly $50 in 2011.[11] A recent FCC report once again confirmed that prices are higher in areas where cable companies have been granted pricing relief based on a finding of "effective competition" as defined in the Cable Act.[12]

In addition to higher prices, this unconstrained consolidation means that the pipe providing access to news, entertainment, education, health care and communication is increasingly controlled by a single actor unconstrained by the forces of competition and free of government oversight.

Similarly, the market for mobile broadband data is quickly trending toward a duopoly. The Justice Department and the FCC forestalled this trend by correctly and courageously denying the merger of AT&T and T-Mobile. However, this momentary pause in consolidation won't last long if the proposed transaction is allowed to proceed unaltered.

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[8] *See National Broadband Plan* at 42. ("[I]n areas that include 75% of the population, consumers will likely have only one service provider (cable companies with DOCSIS 3.0-enabled infrastructure) that can offer very high peak download speeds.").

[9] *See* Crawford, Susan. The Crisis in Communications, note 32 (citing Bernstein Research, Dec. 2010 Black Book 81 (2010)).

[10] *Supra* note 5.

[11] And for most consumers, add to this another $40 in charges for set-top boxes, digital, and HD services. See SNL Kagan U.S. Multichannel Industry Benchmarks, SNL Kagan, (2012).

[12] *See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, Mar. 9 (2012).

Verizon and AT&T control two-thirds of all wireless subscriptions and 70 percent of the most lucrative post-paid market customers.[13] Verizon's profit margin on wireless services is substantially higher than that for all other competitors, except for AT&T; and Verizon and AT&T together account for four-fifths of the entire wireless industry's profits — the only two carriers that can claim double-digit shares of industry profits.[14]

These increasing profits are a reality because consumers are shelling out more and more each month for wireless services. Recent data indicates that the average monthly wireless bill was $86 in 2011, some 25 percent higher than just four years prior.[15]

Figure 1:
U.S. Wireless Market – Key Financial Metrics

Carrier	Spectrum Book Value	Subscribers (2011)	Wireless Market Share	Wireless EBITDA Margin	Share of Wireless Industry EBITDA	Wireless ARPU (2011)	Wireless CapEx as % of Revenue (2011)
Verizon	**$73,250,000,000**	**108,667,000**	**33%**	**48%**	**42%**	**$53.80**	**12.8%**
AT&T	**$51,374,000,000**	**103,247,000**	**31%**	**44%**	**37%**	**$51.02**	**18.6%**
Sprint	**$20,529,000,000**	**55,021,000**	**16%**	**18%**	**7%**	**$45.89**	**8.0%**
T-Mobile^	**$15,265,000,000**	**33,711,000**	**10%**	**31%**	**9%**	**$46.00**	**14.1%**
MetroPCS	**$2,538,600,000**	**9,346,659**	**3%**	**28%**	**2%**	**$40.80**	**22.2%**
U.S. Cellular^	**$1,470,550,000**	**5,932,000**	**2%**	**23%**	**1%**	**$58.09**	**16.5%**
Leap Wireless	**$1,940,824,000**	**5,934,000**	**2%**	**21%**	**1%**	**$42.09**	**14.7%**

Source: Company SEC filings; SNL Kagan; Free Press Analysis

^ 4Q 2011 results not available; 3Q or YTD 2011 values used

Verizon and AT&T's spectrum holdings have nearly four times the value of T-Mobile's and Sprint's combined. These two dominant market players hold 80 percent of the most valuable beachfront spectrum for traveling long distances and penetrating buildings and rough terrain.[16]

[13] *See* Petition to Deny of Free Press, *In re Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo. LLA and Cox TMI Wireless, LLC For Consent to Assign Wireless Licenses*, WT Docket No. 12-4, Feb. 21, 2012 (*Free Press Petition to Deny*), at note 26.

[14] *See Free Press Petition to Deny*, at note 27.

[15] *See* "J.D. Power and Associates Reports: Prevalence of Non-Contract Monthly Service Plans Continues to Grow, as Product Offerings Become More Competitive with Those of Traditional Contract Service Plans," JD Power and Associates, Mar. 31, 2011; and "J.D. Power and Associates Reports: Average Length of Time Wireless Customers Keep Their Mobile Phones Increases Notably," JD Power and Associates, Sep. 23, 2010. The 2011 data quotes above is a weighted average based on the 2011 results reported separately for contract and non-contract services.

[16] *See Free Press Petition to Deny*, at 21.

It is against this backdrop that Verizon, Comcast, Time Warner Cable, Bright House Networks and Cox Communications have proposed to sell one another's services, divide the market for at-home wireline broadband, and provide Verizon Wireless with the incentive and ability to leverage its market position, infrastructure and business relationships to stave off any serious competitive threat in the wireless marketplace.

Allowing for further consolidation in this marketplace will only drive prices higher, reduce consumer choice, and have drastic consequences on the rate of innovation as the companies involved are freed from competition and find diminishing value in investing in better infrastructure.

THE PROPOSED TRANSACTION CEMENTS THE TREND TOWARD A WIRELESS DUOPOLY

The public airwaves over which broadband data is transmitted — spectrum — is the lifeblood of wireless technologies. There is a finite amount of it available and managing this scarcity is one of the most important functions of the Federal Communications Commission.

Control Over the Input Market

In this transaction, Verizon Wireless has agreed to weaken its competitive position in the markets where it offers at-home fiber broadband service in exchange for the opportunity to buy the last nationwide block of highly valuable wireless spectrum that will be available for the foreseeable future. The result will put Verizon in control of close to a third of all mobile broadband spectrum measured by value[17], and it will give Verizon and AT&T a combined 60 percent value share of this critical input market.

When policymakers weigh whether or not this transaction will harm competition or benefit the public interest, they must look across the wireless marketplace and ask questions about the future prospects for competition and how they will be impacted by this deal.

As explained below, excessive control over the essential spectrum-input market will raise barriers to new entrants, inhibit the provisioning of new competitive services to consumers, and ultimately foreclose the ability of smaller competitors to mount serious challenges to the incumbent twin Bell wireless companies.

Not All Spectrum is Created Equal

Each band of spectrum in each local market has unique characteristics that result in no two identically sized blocks holding identical value. These differences are due in

[17] *See Free Press Petition to Deny*, at 17.

part to the propagation characteristics of the spectrum — how far they can carry a signal and how well that signal can penetrate buildings and terrain. The geographic location of spectrum also plays a role — spectrum licenses serving areas with a higher population density are valued differently than more rural areas.

As with property, the location of broadband spectrum is the main driving force of its value. Unfortunately, the screens that the FCC uses to measure spectrum holdings don't measure this dynamic. These antiquated screens are out of date — they measure only for the square footage of holdings (the amount of Mega-Hertz, or MHz) and fail to acknowledge whether the spectrum holdings are beachfront, beach adjacent, or have only a beach view.[18]

Any analysis of this transaction must take into account the value of the spectrum being sold in order to adequately examine the concentration of market power that results from this deal. Simply counting the total MHz of available spectrum held by any one carrier provides an inaccurate and distorted portrait of market power.

An analysis of the spectrum holdings most valued for providing mobile data services reveals a significant imbalance in ownership. Currently two companies — AT&T and Verizon Wireless — hold a disproportionate percentage of beachfront spectrum, with Verizon alone controlling one-third of the spectrum best suited for nationwide mobile broadband.

However, even accounting for the value in spectrum best suited for mobile broadband offers inaccuracies. Spectrum values can vary based on geography and population density, as discussed earlier, and they can also become distorted in the presence of incumbents who can place a higher value on acquiring spectrum to disadvantage potential competitors.[19]

Free Press attempted to provide a crude perspective of spectrum market share based on value by constructing a weighting scheme based on the book value of spectrum holdings reported to the SEC, recent auction prices, and recent prices reported on the secondary markets. The result can be seen in the table below:

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[18] For a more in depth account of the inherent differences in the value of spectrum *see Free Press Petition to Deny*, at10-19.

[19] *See e.g.*Ex ParteSubmission of The United States Department of Justice, *In the Matter of A National Broadband Plan for Our Future*, GN Docket No. 09-51, (2009) (*DoJ Broadband Plan Ex Parte*), at 22-25.

Figure 2:
U.S. Wireless Market
Value-Weighted Shares of Mobile Broadband Spectrum

Carrier	Share of Each Band's Total MHz-Pops							
	700MHz	Cellular	PCS	AWS	BRS	EBS	All Mobile Broadband Spectrum	All Mobile Broadband Spectrum (Value Weighted)*
Verizon	43%	48%	15%	15%	0%	0%	17%	29%
AT&T	24%	44%	26%	8%	0%	0%	16%	25%
Sprint	0%	0%	27%	0%	0%	0%	7%	7%
T-Mobile	0%	0%	20%	27%	0%	0%	10%	10%
MetroPCS	1%	0%	3%	9%	0%	0%	2%	2%
U.S. Cellular	3%	4%	2%	2%	0%	0%	1%	2%
Leap Wireless	0%	0%	2%	9%	0%	0%	2%	2%
Clearwire Corp.	0%	0%	0%	0%	86%	62%	25%	5%
SpectrumCo.	0%	0%	0%	21%	0%	0%	4%	4%
Cox	1%	0%	0%	2%	0%	0%	1%	1%
Other	29%	4%	6%	8%	14%	38%	16%	14%

Source: Fifteenth Report; Free Press Analysis; does not reflect subsequent transactions

***700MHz and cellular spectrum MHz-pops were weighted by a value of 1; PCS and AWS-1 were weighted by a value of 0.5; BRS and EBS were weighted by a value of 0.1. Weights chosen based on recent market valuations.**

Using this approach, we observe that if these applications are approved, Verizon will control fully 35 percent of all value-weighted mobile broadband spectrum. If a more finely tuned valuation methodology is used by the expert federal agency to assess market shares, this level of control over the spectrum input market would clearly be considered moderately concentrated and should raise red flags at the DoJ and the FCC. Given the highly concentrated nature of the overall wireless market, the FCC and the DoJ must conclude that this transaction would significantly weaken future prospects for meaningful wireless competition.

The Impact of Spectrum on Wireless Competition

Without access to a sufficient amount of high-quality spectrum, a wireless company cannot offer first-class wireless services. It cannot scale its business in a cost-efficient way, or keep up with growing consumer demand for wireless data. Spectrum, particularly highly valuable spectrum, is the input market on which the entire wireless industry is built.

The higher the quality of spectrum a carrier controls, the less costly it is for that carrier to expand the capacity of its network. Cell towers can carry signals longer distances with beachfront spectrum, so fewer towers are needed to provide coverage

in a given area.[20]With more spectrum, towers are also less likely to get overloaded with traffic, because the data demands on the tower from surrounding subscribers can be easily spread among the channels that the carrier owns licenses for.

If a carrier lacks higher-quality spectrum, it must build more towers to carry its signal over even short distances, and to ensure its network keeps pace with consumer demand. The FCC has repeatedly noted that to provide coverage that requires one cell site with high-quality spectrum would necessitate nine cells with lower-quality spectrum.[21]

Building a wireless network over low-quality spectrum requires an increase in the ratio of capital expenditures to profit. Put simply, a carrier must spend more of its revenue on building infrastructure and there is less left over for profits.

Therefore, having a weaker spectrum position vis à vis your competitors makes it near impossible to mount a serious competitive challenge. To offer a comparable quality of service to consumers, a wireless company must spend much more to make efficient use of its less valuable spectrum holdings, driving the retail cost of that service to consumers ever higher.

Foreclosure Value

The DoJ has pointed out that because of the important role spectrum plays in the investment strategies of wireless carriers, the value of that spectrum to incumbent providers is increased.[22] The private value of spectrum for an incumbent in a given market includes not only the revenue from use of the spectrum but also any benefits gained by preventing rivals from using that spectrum to erode the incumbents' existing businesses. Therefore, even though a carrier may not need spectrum to meet an immediate demand, it has significant incentives to keep that resource away from its would-be rivals.

Indeed, that appears to be the case in this transaction. The companies seeking approval for this transaction freely admit that "Verizon Wireless has sufficient spectrum to meet its immediate needs, and generally to meet increased demand in many areas until 2015."[23]

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[20]*See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, including Commercial Mobile Services*, WT Docket No. 09-66, Fifteenth Report, 26 FCC Rcd 9664, at para. 293 (rel. June 27, 2011) (*Fifteenth Report*).

[21]*Id.*

[22]*DoJ Broadband Plan Ex Parte.*

[23]*See e.g. Cox Application,* p. 12; *SpectrumCo. Application*, p. 13.

Purchasing this spectrum is not the only way Verizon can meet increasing consumer demand for data, but it is the only way it can foreclose its competitors from providing a serious competitive threat by offering lower-cost high-speed mobile services.

This Spectrum Will Not Be Put to Its Most Immediate and Efficient Use

Verizon fails to offer a detailed explanation of when and in what geographic markets it plans to use the spectrum being sold in this transaction. Without such a showing, it is reasonable to expect that other wireless carriers that do not enjoy Verizon's superior spectrum depth would better serve the public interest by putting these licenses to use immediately.

Indeed, putting this spectrum in the hands of other carriers would promote more balanced use of all broadband spectrum across multiple carriers' networks. That just two carriers hold most of the spectrum available for broadband use (and in turn most of the market share) while pleading spectrum poverty should send a strong signal to the FCC that it is not living up to its congressional mandate to "improve the efficiency of spectrum use."[24]

Verizon also fails to offer any cost-benefit analysis detailing why hoarding this valuable spectrum for multiple years is more beneficial to the public interest than Verizon simply investing in other methods for increasing its capacity locally where it experiences increased data demand.

Verizon emphasizes the ever-increasing number of smartphones and data-heavy devices on its network, but fails to mention the massive increase in revenues that come from this trend.[25] These are profits that can and should be re-invested in the network to increase capacity via cell splitting, Wi-Fi offload and spectrum sharing. A quick look at Verizon's revenues and capital expenditures reveals that the company is well placed to make these investments. The intensity of Verizon's capital expenditures actually declined even as it accelerated its LTE rollout, indicating that it has substantial resources to meet network demand without increasing prices or reducing services.

Verizon could do all of the routine things that carriers do to increase capacity to meet predictable increases in demand. And if Verizon fails to do these routine things, if it fails to invest in capacity enhancements like cell splits, then putting this spectrum in the hands of maverick competitors means customers will have alternatives. This is a reality that the duopoly carriers do not seem to understand — their customers are not and should not be theirs forever, unless the carriers do what is necessary to earn their

[24] 47 U.S.C. § 332(a)(2)

[25] Verizon's wireless revenues for 2007-2011 were $43.824B, $49.298B, $60.325B, $63.407B, and $70.154B. Verizon's net operating profits from its wireless division for 2007-2011 were $11.737B, $13.96B, $16.638B, $18.724B, and $18.527B.

loyalty. Further, it is not the job of government to assist carriers in retaining their customers at the expense of competition and innovation.

The Proposed Joint Operating Entity and Joint Marketing Agreements End What Little Hope Remains for Competition in Home Broadband Service

The joint operating entity (JOE) arrangement and joint marketing agreements (JMAs) represent an agreement between these companies to stay out of one another's way, in perpetuity. The agreements are designed to divide the market for wireline at-home broadband service between the cartel of companies that are party to the deal, and to give these companies more control over the pace of innovation to ensure that any future products and services do not undermine their legacy revenue streams of video and fixed broadband services.

Congress recognized the danger in this sort of arrangement when it passed the 1996 Telecommunications Act. That legislation specifically bars joint collaborations between local cable and local long-distance carriers.[26] That is because in 1996 Congress intended to encourage the kind of intramodal competition between cable and telephone companies that these agreements will eliminate.

The word "competition" was used 196 times on the floor of the Senate to describe the Telecommunications Act.

"Allowing cable companies to provide phones and phone companies to provide cable, this bill will spur competition and reduce costs to the Nation," Sen. Ted Stevens said of the bill his committee helped author.[27]

Openly striking deals to sell your rival's services is not the kind of competition the Telecommunications Act envisioned. The cutthroat competitive environment that pushes innovation forward and forces companies to continually invest in rolling out

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[26]47 U.S.C. § 572. See also Conference Report, Telecommunications Act of 1996, House of Representatives, 104th Congress, 2d Session, H.Rept. 104-458, at p.174. "The conference agreement adopts the provisions of the Senate bill limiting acquisitions and prohibiting joint ventures between local exchange companies and cable operators that operate in the same market to provide video programming to subscribers or to provide telecommunications services in such market. Such carriers or cable operators may enter into a joint venture or partnership for other purposes, including the construction of facilities for the provision of such programming or services. With respect to exceptions to these general rules contained in new section 652 (a), (b), and (c), the conferees agreed, in general, to take the most restrictive provisions of both the Senate bill and the House amendment in order to maximize competition between local exchange carriers and cable operators within local markets."

[27]http://thomas.loc.gov/cgi-bin/query/z?r104:S07JN5-541:/

better products and services is born from companies doing everything they can to steal away their competitors' customers, not by offering to sign up your own customers for rivals' services.

With this transaction, it is clear that offering perpetual reciprocal marketing was the price Verizon paid for a seat at the table to negotiate the price of keeping this spectrum out of the hands of potential competitors. On the other side of the ledger, the cable companies need an assurance that the spectrum asset they are selling would not be used against them either in areas where they directly compete with Verizon FiOS, or by Verizon striking deals to offer quad-play services with satellite video providers.[28]

For the average American consumer, this means higher cable and Internet bills every month; it means higher wireless bills; it means the cable-programming cartel will likely never be broken up; and ultimately it means the quality of U.S. communications networks will continue to trail that of many other developed nations, as the lack of real competition will mean less incentive to invest in R&D and network upgrades.

The Agreements Reduce Verizon's Incentives to Promote FiOS as a Competitive Alternative to Cable Services

Verizon Communications competes head to head with the big cable companies that comprise SpectrumCo in certain markets. It provides its FiOS bundle of voice, video and high-speed broadband service in direct competition with Comcast, Time Warner, Cox and Bright House in markets in the Northeast, Mid-Atlantic and Pacific Northwest regions.

The JMA's and JOE provide a roadmap for these former rivals to collaborate rather than compete. The JMAs in particular remove the incentive for Verizon to aggressively market its FiOS product where the carrier competes head to head with the cable companies that are a party to this deal.

Verizon Communications put it best when it submitted an expert analysis to the FCC in 2009: "[Cable and FiOS] have strong incentives to maintain and expand their subscriber base to spread their fixed costs over a large network of users. When a cable

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[28] *See* remarks of Lowell C. McAdam, President, Chief Executive Officer, COO & Director, Verizon Communications, Inc., UBS Global Media & Communications Conference, December 7, 2011. "I think that's the reality of the situation we are in. As I talked with Brian Roberts, he said '*look, Lowell. If I sell you the spectrum, that puts me on a particular path. I need to have a fallback that if this doesn't work as well as we hope that I'm not blocked out of wireless*,' so I had to respect that as a partner. And an MVNO will have added burdens for them if they choose to go that path. They'll have to make that call, but it will be profitable for us if they do go that way. So it's a win-win I think for both of us." (emphasis added).

company or telco loses a subscriber to its competitors, it loses both the variable profit contribution from that subscriber as well as the subscriber's contribution to its fixed costs of building and maintaining its network."[29]

Now, each time Verizon FiOS' cable competitors sign up a subscriber, the company does not experience this "loss in contribution to its fixed costs"; it sees a new potential mobile data subscriber where its margins are much higher. As a result, this transaction recalibrates the incentives in the market for wireline telecommunications services. The transaction weakens the incentives for Verizon to compete for market share and forecloses the hope that Verizon may expand its FiOS deployment to offer a competitive alternative to the cable monopoly in other markets.

The result will be monthly subscription rates unconstrained by competitive pressure, and a reduction in investment for broadband deployment and infrastructure upgrades. Put simply, this means higher prices and slower speeds for consumers.

The Agreements Prevent a Future Wireless Competitor from Market Entry

The cable companies that jointly comprise SpectrumCo have argued that while their wireline infrastructure puts them in a position to build towers and invest in their own wireless broadband infrastructure, the costs and economies of scale associated with creating a new facilities-based wireless company are prohibitive. That is, they do not believe they can amass wireless market share quickly enough to justify building their own infrastructure.[30]

Therefore, the companies argue, this transaction does not foreclose the entry of wireless competitors since they do not plan to invest in towers, contract with phone manufacturers, and deploy a network in the first place. However, there are several ways to enter the wireless market apart from building a proprietary network. Cable companies could have used this spectrum as leverage to partner with a non-competitive wireless provider, like Sprint or T-Mobile, to buy wholesale access to their infrastructure and become a retail reseller of mobile service.

In fact, many companies engage in this kind of agreement already, operating as so-called "mobile virtual network operators," or MVNOs. For example, Ting is a mobile operator that obtains wholesale access to Sprints network and resells that connection to consumers, offering monthly no-contract services that are below the retail prices charged by Sprint itself.[31]

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[29] *See Petition to Deny of the Communications Workers of America*, at note 15.

[30] *See e.g.* Declaration of Robert Pick, Chief Executive Officer of SpectrumCo, LLC, Exhibit 4 of Public Interest Statement in *Verizon-SpectrumCoApplication*.

[31] See https://ting.com/why-ting/ . "We will make less money per customer in hopes of building more loyal relationships and earning referrals."

Moreover, the cable companies selling this spectrum have shown their perceived need to offer quad-play services through the JMAs. However, under these agreements, the companies are not re-selling access to wireless services under competitive rates, terms and conditions. They are merely signing their own customers into Verizon Wireless' two-year contracts in exchange for an assurance they won't face competition from Verizon FiOS in the monthly video and broadband at-home market.

For example, Verizon Wireless had been working with DIRECT TV to create a bundle of voice, video and mobile broadband that would have competed with cable offerings across the country, but terminated the project directly after announcing this deal.[32] Similarly, the big cable companies had been working with the mobile broadband operator Clearwire to develop a quad-play bundle, and they too terminated that deal as soon as they entered into these JMAs that protect their services from the competition of Verizon FiOS.[33]

From the perspective of consumers, a far better outcome would be for the cable companies to partner with a non-dominant wireless carrier, like Clearwire or T-Mobile, to offer quad-play packages that compete with the current Verizon/AT&T wireless duopoly. This would not only introduce a new competitive threat in the mobile market, it would also preserve what little competition exists in the at-home broadband market that this deal dooms.

The Agreements Signal the End of the FCC's Current Broadband Competition Policy

"Next-generation" wireless service — commonly marketed as 4G LTE — has long been hailed as the coming competitive savior to free consumers from their monopoly cable-broadband prison.

Comcast has used wireless to downplay the harms of the wireline duopoly.[34] Both the current[35] and prior[36] FCC chairmen have cited future wireless competition as the answer to concerns about the wireline duopoly.

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[32] *See* Comments of DIRECT TV, *In re Applications of Verizon et. al.*, at 3.

[33] Peter Svensson, "Cable Companies Drop Wireless Dreams," *Associated Press*, Dec. 2, 2011.

[34] *See e.g.* Comments of Comcast Corporation, GN Docket No. 09-51, June 8, 2009, p. 41; Reply Comments of Comcast Corporation, GN Docket No. 09-51, July 21, 2009, p. 7.

[35] *See e.g.* Steven Levy, "The Wired Interview: FCC Chair Julius Genachowski on Broadband, Google and His iPhone," Wired, March 4, 2010.

[36] *See e.g.* Written Testimony of Chairman Kevin J. Martin, Federal Communication Commission, Before the Committee on Energy and Commerce, U.S. House of Representatives, P. 4, July 24, 2007.

The Commission's Wireless Broadband Access Task Force plainly suggested that "wireless networks can provide competition to existing broadband services delivered through the currently more prevalent wireline and cable technologies. Wireless broadband can create a competitive broadband marketplace and bring the benefits of lower prices, better quality, and greater innovation to consumers."[37]

But be it 3G or 4G, the wireless savior has yet to show up and with these cartelization arrangements, it's clear that Verizon intends its 4G service to be a complement rather than a competitor to the cable broadband monopoly that most consumers face.

These agreements remove any incentive for Verizon Wireless to use its 4G network to offer high-speed Internet access at competitive prices or terms with the current cable broadband packages. Instead, it will continue to keep low caps on the total amount of bandwidth consumed, and it will force would-be subscribers to buy through tiers and bundles of needless other services before purchasing Internet access.[38]

The Agreements Should Trigger Antitrust Scrutiny in Light of the DoJ's Competitor Collaboration Guidelines

The DoJ's "Competitor Collaboration Guidelines" and the "Intellectual Property Guidelines" provide an outline for the kinds of collaboration that would negatively impact competition.

The fact that the companies involved in this transaction are vertically integrated in the markets of monthly cable service, must-have content production and sports coverage, and wireline and wireless broadband services implicates several of the concerns raised in these guidelines and should trigger a strict antitrust review.

For example, conditioning the rights to jointly developed research and development, by an entity outside the agreements, on the purchase of an additional item or contract obligation, could constitute illegal tying as described in Section 5.3 of the "Intellectual Property Guidelines."

If pooling arrangements require the companies to share competitively sensitive technology, this could deter or discourage innovation because none of the companies want the others to have a free ride on their R&D investment.[39]

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[37] *See* "Connected on the Go: Broadband Goes Wireless," Report by the Wireless Broadband Access Task Force ("FCC Wireless Broadband Task Force Report"), Federal Communications Commission, GN Docket No. 04-163, February 2005, at pp. 13-14.

[38] For further commentary on the perils of bundling and tying in the wireless market, *see e.g.* Written Testimony of Joel Kelsey, Consumers Union, Before the Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy and Consumer Rights, June 16, 2009.

[39] *See* Federal Trade Commission and U.S. Department of Justice, Antitrust Guidelines for the

Antitrust concerns should also be triggered if the parties engaged in cross-licensing technology possess aggregate market power, because the likelihood these companies will exclusively deal with one another to exclude potential competitors is heightened.[40]

CONCLUSION

Effective or meaningful competition occurs when 1) the barriers to entry for new competitors in the market are low; 2) consumers have a choice of alternative providers and services in the market and the costs of switching providers do not present an undue burden; 3) innovations in technology are encouraged and lead to expansion of services and product offerings for consumers; and 4) no single firm or a group of firms have the power to influence the prices of the products and services.

However, in the market for wireless and wireline telecommunications services, there are pronounced and extensive barriers to effective competition. Consumers are being locked in to the few large incumbents offering service and competitors are being locked out of the marketplace.

There is no reason this pattern of poorly protecting the public interest has to continue. The DoJ and the FCC showed immense analytical skill and political courage in rejecting the AT&T/T-Mobile merger, even if they did send AT&T home with the Qualcomm parting gift.

Though the transaction we are considering now does not appear on the surface to be as harmful as AT&T's most recent horizontal empire plans, Verizon's consolidation of valuable spectrum raises as many long-term competitive concerns. These concerns alone would be enough to reject these applications, but when viewed along with the unprecedented Verizon-cable cartelization agreements, the federal agencies reviewing this deal have no choice but to tell Verizon no if they intend to protect competition.

Wireless companies are fond of evangelizing about the "spectrum crisis." Well, it's long past time we all get serious about the competition crisis that consumers are already facing, and that begins with the rejection of these anticompetitive license transfers.

Licensing of Intellectual Property (1995) (Intellectual *Property Guidelines)* at Section 5.5.

[40] *Id.*